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IN THE UTAH SUPREME COURT

CURTIS S. BRAMBLE, in his capacity as a	:	
Senator for the State of Utah; STEPHEN H.	:	
URQUHART, in his capacity as a House	:	
Representative for the State of Utah;	:	<u>RESPONSE OF RESPONDENT</u>
BRENDA LARNER, an individual;	:	OFFICE OF LEGISLATIVE RESEARCH
LAURA JOHNSON, an individual;	:	AND GENERAL COUNSEL
PEGGY MACIEL, an individual; and	:	
PARENTS FOR CHOICE IN	:	
EDUCATION, INC., a Utah corporation,	:	
 Petitioners,	:	
 vs.	:	
 OFFICE OF LEGISLATIVE RESEARCH	:	
AND GENERAL COUNSEL, a	:	
governmental entity; and GARY R.	:	Supreme Court No. 20070407-SC
HERBERT, in his capacity as Lieutenant	:	
Governor of the State of Utah,	:	
 Respondents.	:	

Respondent Office of Legislative Research and General Counsel ("Legislative Research"), by and through its counsel M. Gay Taylor and Robert H. Rees, respectfully submits this response to petitioners' Petition for Review of Ballot Title on HB 148 and/or for an

Extraordinary Writ; and for Emergency Relief Staying Deadline for Submission of Arguments on Referendum ("the petition") and to petitioners' Memorandum in Support of Petition for Review of Ballot Title on HB 148 and/or for an Extraordinary Writ; and for Emergency Relief Staying Deadline for Submission of Arguments on Referendum ("petitioners' memorandum").

INTRODUCTION

In compliance with its statutory duty under Utah Code Ann. § 20A-7-308(2) (2003),¹ Legislative Research prepared an impartial ballot title for the referendum on H.B. 148, Education Vouchers, 57th Leg., Gen. Sess. (Utah 2007) ("H.B. 148") (copy attached as addendum 2), a bill that the Legislature passed during the 2007 General Session. The application for circulation of the referendum petition filed by petition sponsors, the referendum petition circulated among voters for signature, the Lieutenant Governor's certification of the petition, and the Governor's executive order calling a statewide special election all state that the purpose of the referendum is a challenge to H.B. 148. Accordingly, the ballot title prepared by Legislative Research summarizes the contents of H.B. 148, as required by Utah Code Ann. § 20A-7-308(2) (2003).

Legislative Research did not include in the ballot title the potential legal impact of H.B. 174, Education Voucher Amendments, 57th Leg., Gen. Sess. (Utah 2007) ("H.B. 174") (copy attached as addendum 3), a separate 2007 General Session bill that is not the subject of the referendum petition. That legal impact is an undecided question with conflicting legal arguments reaching different conclusions. In preparing a ballot title for the referendum on H.B. 148,

¹A copy of Section 20A-7-308 is attached as addendum 1.

Legislative Research has no authority to determine which of those conflicting legal conclusions is correct. If the Court resolves those conflicting interpretations in a way that makes the ballot title prepared by Legislative Research patently false, the Court should revise the ballot title and certify the revised ballot title to the Lieutenant Governor. Otherwise, the Court should certify to the Lieutenant Governor the ballot title prepared by Legislative Research.

In addition to challenging Legislative Research's wording of the ballot title for the referendum on H.B. 148, the petition also asserts other claims. Legislative Research's response is limited to the challenge of the ballot title wording. Legislative Research makes no response and takes no position with respect to the other claims raised by petitioners in the petition.

ISSUE PRESENTED

With respect to Legislative Research's participation in this action, the only issue presented is whether petitioners have clearly and convincingly established that the ballot title prepared by Legislative Research for the referendum on H.B. 148 is patently false, given that: the applicable statute requires Legislative Research to prepare an impartial ballot title summarizing the contents of the referendum measure; the referendum petition circulated to voters and certified by the Lieutenant Governor challenges H.B. 148 only; and Legislative Research has no legal authority to incorporate into the ballot title legal conclusions concerning H.B. 174's impact on the referendum measure.

STATEMENT OF FACTS

Legislative Research accepts petitioners' statement of facts as set forth in the petition and in petitioners' memorandum, with the following exceptions, clarifications, and additions:

1. In statements numbered 1, 3, and 5 of the petition and statements numbered 7, 8, 23, 25, 26, 27, 31, and 32 of petitioners' memorandum, petitioners state as fact what is really a legal conclusion as to the effect of H.B. 174's coordination clause² on the referendum on H.B. 148. Relying on the superseding language of H.B. 174's coordination clause, petitioners assert that H.B. 174 invalidates provisions of H.B. 148 immediately and for all purposes. In addition to not being a statement of fact, that legal conclusion also fails to acknowledge another conflicting argument that reaches a much different conclusion: that H.B. 174 has not superseded provisions of H.B. 148.³ Legislative Research takes no position in this case on either of those arguments,

²The complete text of the coordination clause contained in H.B. 174 is as follows:

"Section 7. **Coordinating H.B. 174 with H.B. 148 -- Substantively superseding amendments.**

If this H.B. 174 and H.B. 148, Education Vouchers, both pass, it is the intent of the Legislature that the amendments to the sections in this bill supersede the amendments to the same numbered sections in H.B. 148 when the Office of Legislative Research and General Counsel prepares the Utah Code database for publication."

³According to that conflicting argument, the superseding language of H.B. 174's coordination clause has impact only in the context of resolving inconsistencies between passed bills as Legislative Research prepares the Utah Code database for publication. (The H.B. 174 amendments "supersede the amendments to . . . H.B. 148 *when the Office of Legislative Research and General Counsel prepares the Utah Code database for publication.*" H.B. 174, Section 7, 57th Leg., Gen. Sess. (Utah 2007) (copy attached as addendum 3) (emphasis added)). Under this argument, the superseding language has no impact unless and until H.B. 148 takes effect, which would happen only if voters approve the bill at the referendum election. Until then, according to this argument, there is nothing for H.B. 174 to supersede. Under normal circumstances, H.B. 148 would have taken effect on the regular effective date of April 30, 2007, the same date that H.B. 174 took effect. *See* Utah Const. art. VI, § 25 (copy attached as addendum 4). With the referendum election pending, however, H.B. 148 will not take effect unless and until it is approved by voters at the referendum election. *See* Utah Code Ann. § 20A-7-301(2) (2003) (copy attached as addendum 5). At that time, the superseding language would, according to this argument, direct Legislative Research to include H.B. 174's superseding provisions in the Utah Code database and to omit H.B. 148's superseded provisions.

but simply points out that there are conflicting arguments as to the effect of the superseding language of H.B. 174's coordination clause.⁴

2. In statement number 4 of the petition, petitioners refer to the Lieutenant Governor's certification of the referendum petition and his delivery of the petition to Legislative Research. A copy of the Lieutenant Governor's letter notifying Legislative Research of the petition certification is attached to this response as addendum 6. In that letter, Lieutenant Governor Herbert states that "today I declared sufficient the referendum petition filed with my office challenging House Bill 148, Education Vouchers."

3. Statement number 5 in the petition and statements numbered 31 and 32 in petitioners' memorandum mischaracterize Legislative Research's actions. Legislative Research's letter to Lieutenant Governor Gary Herbert (copy attached as addendum 7) speaks for itself and states, in relevant part, as follows:

We have complied with the statutory requirement to "prepare an impartial ballot title for the referendum summarizing the contents of the measure" in no more than 100 words. The measure that is the subject of the referendum petition circulated by petitioners is H.B. 148, Education Vouchers. H.B. 148 is also the subject of your certification and the Governor's May 9, 2007 executive order calling for a special election. Accordingly, the referendum on H.B. 148 is the subject of the ballot title.

As you are aware, during the 2007 General Session the Legislature also passed H.B. 174, Education Vouchers Amendments. Like H.B. 148, H.B. 174 deals with the Parent Choice in Education Program. Unlike H.B. 148, however, H.B. 174 is not the subject of a referendum petition, your certification, or the special election

⁴As stated *infra* at pages 8 and 9, Legislative Research, in the context of preparing the ballot title for the referendum on H.B. 148, was statutorily constrained from deciding which of the conflicting legal conclusions is correct.

called by the Governor. Therefore, the ballot title does not address H.B. 174. However, Section 20A-7-703 requires our Office to prepare an impartial analysis of the measure showing its effect on existing law and describing its operation. We will, therefore, consider the provisions enacted by H.B. 174, which are now law, in that impartial analysis, which is included in the voter information pamphlet that you provide under Section 20A-7-701.

4. In statement number 21 in petitioners' memorandum, petitioners state that "[o]nly laws that will 'take effect' are subject to the referendum process" and cite Utah Code Ann. §§ 20A-7-102(2) and 20A-7-301(2). That statement is more a legal argument than a statement of fact and may misstate the meaning of the cited statutory provisions. Utah Code Ann. § 20A-7-102(2) (2003) (copy attached as addendum 8) states:

[Utah voters may] require any law passed by the Legislature, except those laws passed by a two-thirds vote of the members elected to each house of the Legislature, to be referred to the voters for their approval or rejection before the law takes effect.⁵

Utah Code Ann. § 20A-7-301(2) (2002) (copy attached as addendum 5) states:

When a referendum petition has been declared sufficient, the law that is the subject of the petition does not take effect unless and until it is approved by a vote of the people at a regular general election or a statewide special election.

⁵See also Utah Const. art. VI, § 1, Subsection (2)(a) (copy attached as addendum 9), which states that the legal voters of the state may "require any law passed by the Legislature, except those laws passed by a two-thirds vote of the members elected to each house of the Legislature, to be submitted to the voters of the State, as provided by statute, before the law may take effect."

**THE BALLOT TITLE IS AN ACCURATE SUMMARY OF THE REFERENDUM ON
H.B. 148. WHETHER THE BALLOT TITLE WORDING SHOULD BE REVISED
DEPENDS ON HOW THE COURT RULES ON KEY LEGAL ISSUES THAT
LEGISLATIVE RESEARCH HAS NO AUTHORITY
TO DETERMINE IN PREPARING THE BALLOT TITLE.**

Legislative Research's response to the petition and petitioners' memorandum is simple and straightforward. Utah Code Ann. § 20A-7-308(2) (2003) (copy attached as addendum 1) requires Legislative Research to "prepare an impartial ballot title for the referendum summarizing the contents of the measure" in "not more than 100 words." The referendum measure, as stated in the referendum petition circulated for signature⁶ and certified by the Lieutenant Governor⁷, is whether voters should approve or reject H.B. 148.⁸ The ballot title is required to be an accurate reflection of the contents of the referendum measure. Legislative Research prepared a ballot title for the referendum measure as it was framed by petition sponsors, circulated among voters, certified by the Lieutenant Governor, and presented to Legislative

⁶The referendum petition circulated among voters for signature stated that petitioners "respectfully order that House Bill 148, entitled 'Education Vouchers' passed by the 2007 General Session of the Legislature of the state of Utah, be referred to the people of Utah for their approval or rejection. . ." (copy attached as addendum 10). Each petition had a copy of H.B. 148 attached to it. Additionally, in order to receive approval to circulate the referendum petition for signature, the petition sponsors previously filed applications that contain the same language as the referendum petition (copy attached as addendum 11).

⁷ The Lieutenant Governor certified the referendum for H.B. 148 only, stating that he "declared sufficient the referendum petition filed with my office challenging House Bill 148, Education Vouchers" (addendum 6).

⁸In addition, Governor Huntsman's executive order calling for a statewide special election on the referendum measure stated that "[t]he purpose of the statewide special election [to be held November 6, 2007] is to consider the referendum challenging House Bill 148, Education Vouchers" (copy attached as addendum 12).

Research. That ballot title is an impartial and accurate summary of the contents of the referendum on H.B. 148, and is not "patently false." *See* Utah Code Ann. § 20A-7-308(4)(b)(ii) (2003) (copy attached as addendum 1).

Petitioners claim that the ballot title is patently false because it ignores the impact of H.B. 174, specifically the superseding language of H.B. 174's coordination clause. As stated above, other conflicting legal arguments conclude that H.B. 174 does not impact the referendum on H.B.148.⁹ Whether H.B. 174 has any impact on the referendum on H.B. 148 and, if so, what are the consequences of that impact, are questions requiring legal judgments that Legislative Research has no authority to make in connection with preparing the ballot title.¹⁰ Had Legislative Research prepared a ballot title that reflected its own legal judgments as to the impact of H.B. 174 or any other bill or law on the referendum, Legislative Research would have violated the requirement to prepare a ballot title "summarizing the contents of the measure" and would have made the ballot title susceptible to claims from petitioners or referendum sponsors that the ballot title was biased.¹¹ Furthermore, altering the ballot title to reflect Legislative Research's legal

⁹*See* footnote 3 *supra*.

¹⁰In contrast, Utah Code Ann. § 20A-7-703 (2003) (copy attached as addendum 13), which requires Legislative Research to prepare an impartial analysis of each referendum measure for inclusion in the Voter Information Pamphlet prepared by the Lieutenant Governor, requires Legislative Research to "show[] the effect of the measure on existing law."

¹¹In addition to petitioners' argument about the interrelationship between H.B. 148 and H.B. 174, voucher opponents apparently believe that if voters disapprove H.B. 148, H.B. 174 will also be invalidated. *See* Utahns for Public Schools proposed ballot title language, stating that if H.B. 148 is defeated by voters, "HB 174, which amends the voucher program established by HB 148, also will be void and of no effect. . ." (copy attached as addendum 14).

judgment as to H.B. 174's potential impact on the referendum on H.B. 148 would have been a material distortion of the referendum measure as set forth in the petition that was prepared by petition sponsors, circulated among voters for signature, and certified by the Lieutenant Governor. In fulfilling its statutory duty to prepare an impartial ballot title "summarizing the contents of the measure," Legislative Research was legally constrained to focus exclusively on H.B. 148 and ignore conflicting and unsettled legal arguments concerning the impact of H.B. 174 on the referendum on H.B. 148.

Of course, the Court is not similarly constrained. If the Court determines that H.B. 174 impacts the referendum on H.B. 148 in a way that makes the ballot title prepared by Legislative Research "patently false," the Court can and should revise the ballot title to reflect the Court's decision. However, if the Court rules that the referendum vote should go forward based on the referendum petition that was circulated and certified as a challenge to H.B. 148 alone, the Court should certify the ballot title as prepared by Legislative Research.¹²

CONCLUSION

For the foregoing reasons, Legislative Research respectfully requests the Court to examine the ballot title prepared by Legislative Research in light of the applicable statutory requirements and the nature of the referendum as set forth in the referendum petition circulated

¹²Utah Code Ann. § 20A-7-308(4)(c) (2003) (copy attached as addendum 1) states:

(c) The Supreme Court shall:

- (i) examine the ballot title;
- (ii) hear arguments; and
- (iii) within five days of its decision, certify to the lieutenant governor a ballot title for the measure that meets the requirements of this section.

among voters and certified by the Lieutenant Governor. If petitioners failed to meet their burden of clearly and convincingly establishing that the ballot title prepared by Legislative Research is patently false, the Court should certify that ballot title to the Lieutenant Governor for inclusion on the ballot at the referendum election. If the ballot title becomes patently false because of the Court's ruling on the interrelationship between H.B. 148 and H.B. 174, however, the Court should revise the wording of the ballot title to reflect the Court's ruling and then certify that ballot title to the Lieutenant Governor, as provided in Utah Code Ann. § 20A-7-308(4)(b) and (c) (2003).

Respectfully submitted this 29th day of May, 2007.

M. Gay Taylor
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Attorneys for Respondent Office of Legislative
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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2007, a true and correct copy of the foregoing Response of Respondent Office of Legislative Research and General Counsel was hand delivered to the following:

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